No. 02-435 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

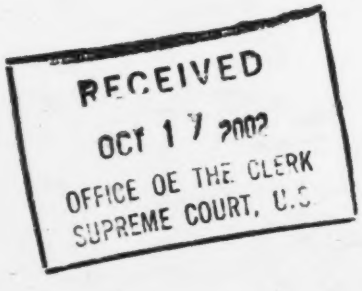
STATE OF OHIO,
Petitioner,

-vs-

ANGEL M. TORR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO,
TENTH APPELLATE DISTRICT

BRIEF IN OPPOSITION



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QUESTION PRESENTED FOR REVIEW

Does Jackson v. Virginia, 443 U.S. 307 (1979) control appellate review of the sufficiency of the evidence by state courts beyond holding that due process requires reversal only if after viewing the evidence in the light most favorable to the prosecution no rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt?

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BRIEF IN OPPOSITION TO THE STATE OF OHIO'S PETITION FOR A WRIT OF CERTIORARI

Respondent Angel M. Torr respectfully requests that the court deny the petition for a writ of certiorari seeking review of the judgement of the Court of Appeal of Ohio, Tenth Appellate District.

STATEMENT OF THE CASE

Respondent Angel M. Torr was indicted for involuntary manslaughter in violation of Section 2903.04 of the Ohio Revised Code, and endangering children in violation of O.R.C. 2919.22. Both counts arose from the death of her five-year old son, William Welch, in a house fire on July 5, 2000. The endangering count alleged that she "did recklessly create a substantial risk to the health or safety of the said William Welch by violating a duty of care, protection, or support, resulting in serious physical harm to the said William Welch..." The involuntary manslaughter count

alleged William's death was the proximate result of the offense of endangering.

The case was assigned for trial to the Honorable Deborah P. O'Neill of the Court of Common Pleas of Franklin County, Ohio. Prior to trial the court overruled defense motions seeking a more specific Bill of Particulars and a motion to dismiss, contending the child endangering statute was unconstitutionally vague and overbroad as applied to the facts of this case. Respondent waived her right to trial by jury and the case was tried to the court.

Testimony at the trial indicated that when respondent left for the grocery on the afternoon of July 5, 2000 she told her son, who was playing with a friend down the street, to check in at home, where she expected her younger sister Nichole to return after delivering a note to their grandmother who lived across the street. While William had an apparent fascination with fire, he had been punished and received counselling. There had been no recent incidents, and there was no specific reason to believe that there was a strong possibility he would start a fire that afternoon.

Respondent's grandmother, Delores Torr, gave an account of what happened next. Nichole came over with a note asking to borrow money to pay for cleaning supplies respondent could not charge to her food stamp card. Nichole asked to use the phone to call her mother. While Nichole was on the phone they heard William call for help.

> And we started over, half way over she says, "Oh Gramma, there's smoke coming out from the upstairs window." And I said, "Okay, get the phone and call 911." I said, "Also, go over and get my fire extinguisher."

Before this she had heard no loud sounds, such as an explosion or fireworks being set off.

Mrs. Torr went first to pound on the door of the apartment in the other half of the double, where Betty Jo Miller-Geiger lived. She got no response and assumed "BJ" wasn't home. She saw flames inside respondent's apartment, but went inside anyway. Smoke and flames kept her from going upstairs. She called for William to come down. She got no response, so assuming he had gone to the front bedroom, she called for him to break out the window and jump, hoping to catch him. He said "Gramma, I can't do it, I can't do it." She heard an explosion, which proved to be the windows blowing out. Then:

> ...a neighbor on down the end came running out. He says, "Is anybody up there?" I said, "William's up there," so he ran around to the back and tried to get in." I pounded on BJ Miller's door again, she finally came, said, "Oh, we were up in the shower; we didn't hear anything." I said, "Well, just get out of here." I said, "There's a fire," I said, "just leave."

After this a medic unit brought the first fire-fighters to the scene. As directed, she returned to her house.

The fire was put out. William's body was found by a window in an upstairs bedroom. One of the firefighters observed water running in the sink of the second floor bathroom. Though the room was heavily charred, the sink was filled with clean plastic bottles.

An investigator with the State Fire Marshall's office arrived at the scene at 6:30 and assisted other investigators on the scene. The fire was determined to have started on the first floor, at the

base of the stairs, specifically in a couch at that location. The exact cause of the fire could not be determined, though it was believed to be of human origin. On direct the investigator tended to discount the possibility a burning cigarette between the cushions of the couch could have started the fire, since some studies had shown it took an hour and a half or longer for smoldering cigarettes to produce flames in such circumstances.

Respondent learned of the fire when her sister had her paged at the grocery store. She immediately returned home. She spoke to a detective on the night of the fire and on two later occasions. She told the detective that someone had given her son five sparklers when they went to the Whetstone Park fireworks on the 4th, but he had used all of them before they left. On the afternoon of the 5th she, her sister Nichole and Paul Trout had sat in the living room watching TV. They shared a pack of cigarettes and a lighter. She said the lighter was on a coffee table, but was not asked what became of it when they left for the store. She sent her sister with a note to their grandmother, who lived across the street, but expected her to be gone for only a few minutes:

> I thought she was only going to be gone just a few minutes, long enough to give the Grandma the letter, because she knew I was going to the grocery store and I told her that I would find Will and have him come check in.

She said her son had not begun playing with fire until his father went to jail the most recent time. She said she had taken him for fire counselling a "on a couple of occasions," but could not remember exactly.

Before and during trial it was difficult to pin down the precise conduct the prosecutor believed established the elements of the offenses charged. A initial motion for a bill or particulars was followed by the above referenced motion for an additional bill of particulars and motion to dismiss on the grounds the child endangering statute was void for vagueness and overly broad as applied to the facts of this case. The court was uncomfortable about addressing the motion in view of its upcoming duty to serve as the trier of fact.

Notwithstanding the bill of particulars narrowing the time frame to the time of the fire, the prosecutor in his opening statement invoked conduct at other times, including the claimed failure to complete counselling offered by a suburban fire department, contact in April with a Franklin County Children Services caseworker, engaging respondent's sister Nichole to watch William during the summer, and failure to instruct Nichole as to how to deal with William's fascination with fire.

The state's strategy in examining witnesses was to paint respondent as an irresponsible mother who let her son range further about the neighborhood on his bike than was prudent, then was happy for the opportunity to ride in a stretch limousine to his funeral and have her picture in the paper. There was testimony concerning fires previously set by William and efforts made to deter such conduct. These included fire safety classes respondent did not follow through on around the time she lost her job because of medical problems, had her car repossessed, and lost phone service.

The prosecutor called William's father. His years with respondent and their son had been interrupted by periods of incarceration, time spent in drug rehabilitation, incidents of domestic violence when he tried to forcibly remove the child, and periods of separation. While incarcerated he was in the habit of writing to the local child welfare agency complaining of respondent's conduct. The prosecutor suggested respondent was glad her son died, calling a neighbor who claimed that on the day of the fire, when William reacted to something his mother said by "getting an attitude" and storming off on his bike, respondent acted inappropriately, including telling her son, "I swear sometimes you are such a goddamn mother fucking inconvenience in my life...I wish you had died in the first fire." Vilification continued through closing argument.

On November 14, 2000 respondent was found guilty of endangering children, but not guilty of involuntary manslaughter. The judge prefaced her decision from the bench by stating:

> It takes a village to raise a child and this village failed William terribly. However, I cannot punish the village. I can only punish you, Angel, as his parent and his legal guardian. Your rough childhood does not excuse your conduct. In spite of your tough times, you have showed the Court that you have the ability to be a caring and loving parent. You have shown the Court through this testimony that William was the center of your life.

In finding respondent not guilty of involuntary manslaughter, the judge stated:

> However, I do not find that the State has proved beyond a reasonable doubt that child endangering was the proximate cause of William's death, insofar as the State has failed to prove beyond a reasonable doubt the cause of the fire. The State has failed to prove that the

> defendant's unlawful acts set in motion a sequence of events leading to William's death. I do not find that your acts constituted foreseeability under the statute, and as such I must find you not guilty of Count One, the involuntary manslaughter.

No findings were entered attempting to draw a distinction in this regard between the manslaughter and endangering counts. The Court immediately imposed a three-year sentence, with credit for ninety-one days of pretrial detention.

An appeal was taken to the Court of Appeals of Ohio, Tenth Appellate District, advancing five assignments of error:

> FIRST ASSIGNMENT OF ERROR: Focus on irrelevant matters not bearing on proof of the elements of the offenses charged constituted prosecutorial misconduct requiring reversal.
>
> SECOND ASSIGNMENT OF ERROR: The Court erroneously overruled an objection to irrelevant testimony concerning appellant's use of funds collected before her son's funeral.
>
> THIRD ASSIGNMENT OF ERROR: Appellant's conviction was not supported by sufficient evidence.
>
> FOURTH ASSIGNMENT OF ERROR: Appellant's conviction was against the manifest weight of the evidence.
>
> FIFTH ASSIGNMENT OF ERROR: The court erroneously overruled appellant's motion for acquittal pursuant to Criminal Rule 29.

In an opinion rendered January 15, 2002 the Court of Appeals overruled the first and second assignments of error, agreeing that the matters in question were irrelevant, but discounting the degree of prejudice. The third assignment of error was sustained only to the extent that respondent should be resentenced for a misdemeanor violation of Ohio's endangering children statute. The fourth and

fifth assignments of error were overruled. State v. Torr 2002-Ohio-524 (2002).

In response to this judgment petitioner, the Franklin County Prosecutor, filed a motion asking the Court of Appeals to reconsider its decision. An April 30, 2002 memorandum decision denied reconsideration. Responding both to petitioner's claims and the manner in which they were expressed, the court explained its reasoning as follows:

> * * * The court has, at all times been aware that the trial court found appellant guilty of felony endangering. The statement, as is obvious from any reasonable reading of the opinion, relates back to the application of the trial court's specific findings of fact to the elements of both negligent and felonious endangering of a child.
>
> We were also aware of the difference between proximate cause of death by involuntary manslaughter and proof of serious physical harm resulting from recklessly violating a duty of care and protection to the child, which results in serious physical harm. The problem, as we explained in our opinion of January 15, 2002, is that the trial court specifically found that the state failed to prove that appellant's unlawful acts set in motion a sequence of events leading to the child's death. The acts to which the trial court was referring were the actions or inactions relating to the child's problem with setting fires. Specifically, the trial court found that there was no proof that those reckless acts caused harm to the child. That only left negligent acts (a failure to secure an appropriate babysitter or the lapse of time before the babysitter arrived) that resulted in harm. The reckless acts had no causal relationship to the harm suffered applying the trial court's findings of fact to the elements of negligent child endangering and felony. The trial court, in effect, found that appellee failed to meet its burden of proving anything other than negligent child endangering. The trial court's judgment of felonious child endangering was erroneous.

Petitioner also asked the Court of Appeals to certify its decision to the Supreme Court of Ohio under Section 3(B)(4), Article IV of the Ohio Constitution as being in conflict with

decisions in other appellate districts. The proposed questions were:

> Question No. 1: Whether reversal is warranted on appeal when the trial court in a bench trial has entered inconsistent verdicts on different counts of a multi-count indictment.
>
> Question No. 2: Whether a trial court's not guilty verdict in a bench trial on one count of a multi-count indictment can be used as grounds on appeal to sustain an insufficient-evidence challenge to the trial court's guilty verdict on another count.

The Court of Appeals refused to certify a conflict. The April 30th decision states: "The result in this case was not predicated upon an inconsistency in finding appellant not guilty of involuntary manslaughter and guilty of felonious endangering of her child."

Finally petitioner sought discretionary review by the Supreme Court of Ohio. Respondent sought leave to pursue a cross appeal, advancing propositions of law relating to prosecutorial misconduct in the state's efforts to vilify respondent by focusing on matters not relevant to the elements of the offenses charged, and asserting sufficiency of the evidence claims rejected by the Court of Appeals. The Supreme Court of Ohio denied both leave to appeal and leave to cross-appeal. State v. Torr 95 Ohio St. 3d 1485 (2002).

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner has not advanced a question meriting review by the Court.

The question presented for review by petitioner has no logical connection to this court's decision in Jackson v. Virginia, 443 U.S. 307 (1979). Jackson does not set forth a rigid framework governing appellate review of the weight and sufficiency of the evidence. Instead it addresses what due process minimally requires to sustain a criminal conviction.

In determining Jackson's habeas corpus action the lower federal courts had applied the "no evidence" standard of review set forth in Thompson v. Louisville, 362 U.S. 199 (1960). Thompson involved a loitering and disorderly conduct prosecution in which the defendant claimed, and this court agreed, that the record was totally lacking in evidence to support conviction under the two Louisville ordinances:

> Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be a sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt.

Id. at 206 (footnotes omitted). Ten years after Thompson the Court decided In re Winship, 397 U.S. 358 (1970), holding at p.364:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In light of this, the question arose whether appellate review of the sufficiency of the evidence in a criminal case required more

than the "no evidence" standard fashioned from the Thompson opinion. In Jackson, this Court found that the Due Process Clause of the Fourteenth Amendment did require more.

The initial paragraph of the Jackson opinion states:

> The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt, In re Winship, 397 U.S. 358. The question in this case is what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence.

The opinion distinguishes the situation in Thompson, where the claim was that conviction based on no evidence was a violation of due process, from the more common situation where there was some evidence, but not enough to fairly sustain conviction. The Court concluded that more than a no evidence standard was required to satisfy due process as:

> ... a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a judge sitting as a jury...

Jackson at 317. The Court held:

> After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."...Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt...

Id. at 318-319 (footnotes and citations omitted).

From this petitioner posits as the Question Presented for Review:

> Whether an appellate court violates the standard of review for sufficiency of the evidence under Jackson v. Virginia, 443 U.S. 307 (1979), when it finds that the evidence was sufficient to support the guilty verdict on one count but then proceeds to sustain an insufficient-evidence challenge to that count by relying on the trial court's findings regarding another count of the same indictment.

Nothing in Jackson prohibits a reviewing court from looking at a trial court's specific findings when passing on a sufficiency of the evidence claim.

II. The decision below was correct.

The Court of Appeals decision ruling on petitioner's motion to reconsider states:

> ...the trial court found that there was no proof that those reckless acts caused harm to the child. That only left negligent acts (a failure to secure an appropriate babysitter or the lapse of time before the babysitter arrived) that resulted in harm. The reckless acts had no causal relationship to the harm suffered applying the trial court's findings of fact to the elements of negligent child endangering and felony.

The distinction between reckless acts and negligent acts is significant. The Statement of the Case mentions efforts to determine in advance of trial what conduct the state relied upon to make out the offenses charged. Notwithstanding the prosecutor's broader claims of parental unfitness before and after the time of the incident, a bill of particulars had identified the conduct of the defendant, its date and time to be as follows:

> Angel Marie Torr, at approximately 4:26 p.m., on or about the 5th day of July in the year of our Lord, 2000, within the County of Franklin aforesaid, in violation of section 2919.22 of the Ohio Revised Code, being the parent, guardian, custodian, person having custody or control, or person in loco parentis, of a child under eighteen (18), to wit: William Welch, five (5) years of age, did recklessly create a substantial risk to the health or safety of the said William Welch by violating a duty of care, protection, or support, resulting in serious physical harm to the said William Welch.

According to Section 2901.21(A) of the Ohio Revised Code, unless strict liability is intended, a person is not guilty of an offense unless:

> (1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;
>
> (2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

If the statutory definition of an offense does not include a culpable mental state, as is the case with the child endangering statute, and strict liability is not intended, the state must prove recklessness. [O.R.C. 2901.21(B).] O.R.C. 2901.22 defines when an offender may be found to have acted purposely, knowingly, recklessly and negligently. Recklessness is based on perversely disregarding a known risk with heedless indifference to the consequences. Negligence merely involves a lapse from due care. The Court of Appeal's resolution of respondent's sufficiency of the evidence claim is less a matter of applying Jackson and controlling Ohio case law than looking to the specific elements of the crime, the controlling culpable mental state, and holding the trial judge to her word. It doesn't matter whether or not the Court of Appeals

believed the proof in support of the serious physical harm element of felony child endangering was supported by the evidence. The trial court specifically found that the necessary link did not exist.

While inconsistent verdicts do not provide a basis for relief in the federal system, this court, in United States v. Powell, 469 U.S. 57 (1984), indicated that the remedy for such irrational decisions by the trier of fact lies in appellate review of the sufficiency of the evidence:

> Finally, we note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. See Glasser v. United States, 315 U.S. 60, 80 (1942); Fed. Rule Crim. Proc. 29(a); cf. Jackson v. Virginia, 443 U.S. 307, 316, 319 (1979). This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary.

Id. at 67. This equally applies to bench trials and was the basis upon which the Court of Appeals granted relief.

III. The decision below rests primarily on state law.

Ultimately the Court of Appeals decision rests on application of Ohio law concerning appellate review of the weight and

sufficiency of the evidence. While Ohio law recognizes the constitutional obligations enunciated in Jackson and other decisions of this court, it also rests on the Ohio Constitution and a long line of decisions addressing appellate review of the weight and sufficiency of the evidence in criminal cases. State v. Thompkins, 78 Ohio St. 3d 380, 678 N.E. 2d 541, 1997-Ohio-52 (1997) is the leading Ohio case on appellate review of weight and sufficiency. It arose in the context of determining when Section 3(B)(3), Article IV of the Ohio Constitution requires unanimous concurrence of all three judges on a Court of Appeals panel reviewing a case, but provides considerable discussion of prior Ohio law and the distinction between weight and sufficiency.

Ohio law recognizes a sufficiency of the evidence claim as the proper avenue to the limited relief granted by the Court of Appeals in this case. O.R.C. 2945.79 provides:

> A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (D) That the verdict is not sustained by sufficient evidence or is contrary to law; but if the evidence shows the defendant is not guilty of the degree of a crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or affording a new trial, and pass sentence on such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal.
>
> * * *

In State v. Huntley, 30 Ohio App. 3d 29, 505 N.E. 2d 1007 (1986), the underlined language was relied upon by the Hamilton County Court of Appeals in remanding the case of a defendant convicted of burglary for conviction to be entered on the lesser-included offense of breaking and entering.

Though Ohio generally disavows inconsistent verdicts as an avenue to relief on appeal, there are exceptions. Paragraph two of the syllabus to State v. Adams, 53 Ohio St. 2d 223, 374 N.E. 2d 137 (1978), vacated on other grounds 439 U.S. 811 (1978), which states the holding of the case, provides:

> The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count. (Browning v. State, 120 Ohio St. 62, approved and followed.)

Under Ohio law, venue is not a material element of the crime charged, but is viewed as a fact which must be proved beyond a reasonable doubt. Where three people were charged with the same acts in the same location, if venue was improper to two, it was improper for the third as well. State v. Fields, 84 Ohio App. 3d 423, 427, 616 N.E. 2d 1185 (1992). The Court of Appeals plainly stated in its decision refusing to certify this case to the Supreme Court of Ohio that its decision was not based on inconsistent verdicts. But even if it were, nothing in this court's decisions in Dunn v. United States, 284 U.S. 390 (1932), Harris v. Rivera 454 U.S. 348 (1981) or United States v. Powell, supra, prevents the states from granting relief from inconsistent verdicts to this extent Ohio law already does, or on an even broader basis.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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